UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 14 | Number 3 Article 5

Fall 1989

U.S. Tobacco Goes Abroad: Section 301 of the 1974 Trade Act as a Tool for Achieving Access to Foreign Tobacco Markets

Fred H. Jones

U.S. Tobacco Goes Abroad: Section 301 of the 1974 Trade Act as a Tool for Achieving Access to Foreign Tobacco Markets

I. Introduction

Attracted by the prospect of unexploited international tobacco markets and by an increasingly stagnant and sometimes hostile domestic market, U.S. tobacco companies are interested now more than ever in increasing exports and commanding a larger share of world tobacco sales. Currently, U.S. exports of tobacco are increasing[1] but without a significant corresponding gain in world market share.[2] One major reason for the failure to increase market share is that many foreign markets targeted for tobacco exports are partially or completely closed due to protectionist trade barriers erected by foreign governments.[3] There are relatively few effective measures avail-

---

[1] U.S. DEP'T OF COMMERCE, 1988 STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 1349 at 775 [hereinafter 1988 STATISTICAL ABSTRACT]. The value of U.S. tobacco exports increased from $679 million in 1970, to $2.1 billion in 1979, and then to $2.7 billion in 1986. *Id.* The Tobacco Institute estimated 1987 exports of tobacco at $3.4 billion. TOBACCO INSTITUTE, TOBACCO INDUSTRY PROFILE 1988 3 (1987) [hereinafter TOBACCO PROFILE].

[2] U.S. DEP'T OF COMMERCE, 1989 STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 1115 at 643. U.S. exports of unmanufactured tobacco, as a percentage of world exports, increased only from 17.5% in 1984, to 17.6% in 1985 and actually decreased to 16.1% in 1986. *Id.*

[3] The United States Trade Representative (USTR) reports annually on the existence of foreign trade barriers to U.S. commerce. In the 1989 report the USTR classified trade barriers into eight categories, six of which are potentially relevant to the export of tobacco. The six relevant categories are: import policies; standards, testing, labelling and certification; government procurement; export subsidies; investment barriers; and other barriers. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1989 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 1-2. The two remaining categories are intellectual property-related barriers and services barriers. *Id.*

The USTR has identified at least ten countries (or trading entities) that currently impose trade barriers on U.S. tobacco exports. Australia imposes minimum local content requirements. *Id.* at 13. China has quantitative restrictions on the import of cigarettes. *Id.* at 41. The European Community maintains high tariffs on cigarettes. *Id.* at 58. In 1986, Japan agreed to remove its cigarette tariff, modify its cigarette distribution system, and eliminate discriminatory excise tax payments. These concessions have not been fully implemented, however, and restrictions on tobacco shipping still remain. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1987 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 189-90. Korea had completely closed its market to foreign cigarettes until 1987, when the United States was granted access to 1% of the market. *Id.* at 200-01. New Zealand imposes high tariffs on tobacco products. *Id.* at 233. Spain maintains restrictive shipping practices. *Id.* at 277. In 1985, Taiwan had high tariffs and discriminatory pricing practices resulting in U.S. sales of cigarettes being restricted to less

able to private U.S. companies that help force open inaccessible markets or provide relief from the allegedly unfair foreign trading practices. Section 301 of the 1974 Trade Act[4] is one measure that has recently emerged as a prominent weapon for U.S. exporters. Section 301 enables private individuals or companies to petition the USTR to carry out retaliatory economic sanctions against foreign governments that have unfairly restricted trade with the United States.[5] Section 301 proceedings became increasingly prevalent under the Reagan administration,[6] a trend that is likely to continue now that recent amendments to section 301 require mandatory investigation and response by the federal government in some cases.[7] This Comment examines some of the reasons for the tobacco industry's push for greater access to international markets, the barriers that exist to such access, and the use of section 301 as a tool to obtain market access.

II. Overview of the Current Domestic Tobacco Market—Reasons to Look Abroad

Although U.S. tobacco companies are not financially imperiled, three characteristics of the domestic tobacco market illustrate stagnation and hostility in the domestic market as compared to the international market. These characteristics are a decline in smoking associated with a heightened awareness of the health risks of smoking, increased governmental regulation, and greater exposure to liability for tobacco-related injuries. These easily recognizable characteristics help establish a context for the industry's desire to expand internationally. Despite relative domestic unease and the desire for international expansion, it is unlikely that the U.S. market, with its fifty million smokers,[8] will be neglected by its domestic producers.

---

than 1% of the domestic market. *Id.* at 305-06. Thailand has a domestic cigarette monopoly, keeps its market closed to foreign brands, and restricts imported leaf for use in Thai tobacco products. *Id.* at 309. Yugoslavia taxes cigarettes progressively, resulting in a 2% U.S. share of the Yugoslav market. *Id.* at 335.

[4] Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (as amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1107, 1164) (to be codified at 19 U.S.C. §§ 2411-19) [hereinafter Trade Act of 1988].

[5] *Id.* § 302(a)(1). *See infra* notes 66-89 and accompanying text (describing the scope of § 301 and its procedure).

[6] *See* Bello & Holmer, *U.S. Trade Law and Policy Series No. 10: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211, 215-16 (1987).

[7] Trade Act of 1988, *supra* note 4, § 301(a). These amendments remove a large degree of discretion on the part of the USTR with regard to the timing of retaliatory action and the scope of the action itself. This, in effect, guarantees to petitioners with valid complaints under the mandatory provisions some sort of executive action. For discussion of the merits of these amendments, see *infra* notes 121-35 and accompanying text.

[8] U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SMOKING, TOBACCO AND HEALTH: A FACT BOOK 2 (1987).

A. Declining Total Market and Increasing Health Awareness

The first, and most compelling, negative characteristic of the U.S. tobacco market is that U.S. consumers are using substantially less tobacco now than at any time since the turn of the century.[9] The high-water mark for per capita consumption of cigarettes was 1963, when the average U.S. smoker consumed 4,345 cigarettes per year.[10] Consumption of cigarettes has decreased steadily from 4,100 per capita in 1975, to 3,200 per capita in 1987.[11] Despite the decline in smoking, however, 1987 was a record year for U.S. expenditures ($35.5 billion) on tobacco products.[12] There are at least two reasons for these apparently contradictory statistics. First, the average price for cigarettes rose five cents from 1986 to 1987.[13] Second, because tobacco is addictive, demand for cigarettes is relatively inelastic. This results in relatively small decreases in consumption of tobacco despite increasing costs. Thus, per capita consumption of cigarettes in the United States is decreasing and markets with potential to expand (*e.g.*, those in developing countries) are becoming relatively more attractive.

The impact of health awareness on smoking was relatively insignificant at first, but has been growing in importance since the mid 1960s. Without question, the Surgeon General's 1964 report on smoking[14] was a key factor in convincing the public that the risks of smoking are real.[15] Since 1964, the Surgeon General has reported on the health consequences of smoking with increasing regularity and with ever more compelling results. By 1987, many of the early findings had been reconfirmed and new risks had been indentified.[16]

---

[9] There are several reasons for this trend. Probably the most important reason is that people are now more aware of the health risks of using tobacco and choose to consume less. Other explanations include: improvements in industry technology resulting in less tobacco waste in production; increased production of healthier low-tar cigarettes containing less tobacco; and the use by some producers of less expensive foreign tobacco as filler in production of U.S. cigarettes. *See* W. FINGER, THE TOBACCO INDUSTRY IN TRANSITION: POLICIES FOR THE 1980s 119 (1981) [hereinafter FINGER].

[10] TOBACCO PROFILE, *supra* note 1, at 1.

[11] U.S. DEP'T OF COMMERCE, 1989 STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 1290 at 737.

[12] TOBACCO PROFILE, *supra* note 1, at 1.

[13] *Id.*

[14] SURGEON GENERAL OF THE UNITED STATES, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

[15] SURGEON GENERAL OF THE UNITED STATES, SUMMARY OF THE REPORT OF THE SURGEON GENERAL'S ADVISORY COMMITTEE ON SMOKING AND HEALTH (1964). The 1964 report concluded that cigarette smoking is a factor in oral cancer, and cancer of the lungs, larynx, esophogus, and urinary bladder. In some cases the Surgeon General stopped short of declaring a causal link but did conclude that an "association" exists between smoking and cancer. The report also declared smoking a factor in chronic bronchitis, pulmonary emphysema, bronchopulmonary disease, cardiovascular disease, and low infant birth weight in babies born to mothers who smoke. As a result of these factors, the Surgeon General concluded that smoking contributed to increased death rates.

[16] *See* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SMOKING, TOBACCO AND HEALTH:

These findings alerted the U.S. public to the reality of the hazards of smoking.

The United States is certainly not the only nation to decrease per capita consumption of tobacco due to the health risks of smoking. Japan and the European Community, two of the United States' major trading partners in tobacco, have also trimmed per capita consumption of tobacco.[17] Given the widespread knowledge of the dangers of smoking, how can the international market for tobacco be any more attractive than the domestic market? One answer is that many parts of the world, particularly developing countries, lack the same degree of health consciousness that exists today in the United States and Europe.[18] Perhaps people in these areas of the world are puffing along in the same blissful ignorance that U.S. smokers enjoyed prior to 1964. Another answer is that in some areas exposure to the power of Western culture and advertising has made the risks of smoking seem worthwhile in exchange for the image of maturity, attractiveness, and virility that often is associated with smoking.[19] A final answer is that perhaps the governments of developing countries cannot afford to give up the tax revenues of the tobacco industry while at the same time spending money to promote health campaigns such as those in the United States.[20]

These answers are supported by many reports in the 1980s indicating that per capita consumption of tobacco is increasing in the third world market. For example, the increase in tobacco consumption in developing countries since the 1970s has been estimated at between two percent[21] and five percent.[22] From 1970 to 1980, consumption in Africa increased an estimated thirty-three percent; in Latin America during the same period a twenty-four percent increase was estimated; and in Asia (excluding Japan) the increase was twenty-three percent.[23] These figures are even more encouraging to exporters because this market contains more than one-half of the world's population.[24] Thus, whereas awareness of health risks may be dampening enthusiasm for smoking in the United States, Europe,

---

A FACT BOOK (1987). In addition to the 1964 dangers, smoking has been related to chronic obstructive lung disease and is associated with cancer of the bladder, pancreas, and kidney. *Id.* at 9.

17 FINGER, *supra* note 9, at 127.

18 *Id.* at 151; *see also* Huebner, *Tobacco's Lucrative Third World Invasion*, 11 BUS. & SOC'Y REV. 49 (1980).

19 FINGER, *supra* note 9, at 123. Cigarette advertising in the United States certainly seems to suggest that smoking is associated with a fashionable, successful image. This is probably one reason for the continued high levels of smoking in the United States today despite the acute awareness of health risks.

20 *Id.* at 151.

21 *Id.* at 123.

22 *Id.* at 168 (United Nations estimate).

23 *Id.*

24 *Id.* at 151.

and Japan, other regions of the world are evidently not so affected. The result is that the potential market opportunities in the rest of the world are very attractive indeed.[25]

B. Legislative Aspects of Market Hostility

A second market characteristic illustrating a certain degree of domestic hostility is the growing amount of legislation being passed that burdens the tobacco industry. This characteristic has been evident since 1971, when cigarette advertising was banned from the airwaves.[26] Cigarette advertising is not only banned from some media, it also is highly regulated with respect to labelling.[27] In addition to warnings on cigarette packages, the federal government has initiated a program directed by the Secretary of Health and Human Services to "inform the public of any dangers to human health presented by smoking."[28] Legislative hostility to smoking is also evidenced by the fact that, as of 1987, at least forty-two states had enacted laws that limit or prohibit smoking in public places.[29] One significant recent federal action against smoking was an FAA regulation effective April 23, 1988, prohibiting smoking on all domestic airline flights of less than two hours.[30] On occasions where the federal or state governments have not acted to prohibit or limit smoking, private litigants have often sought to have the courts prohibit smoking in certain

---

[25] It should be noted that zealous pursuit of increased exports of tobacco products is not universally applauded. Expanded world trade is usually seen as beneficial to all concerned, but in the case of trade in tobacco products special considerations arise. For example, should the United States encourage the export of substances like tobacco that are known to be exceedingly unhealthy? Should explicit warnings accompany tobacco exports, especially to areas that are still largely unaware of the risks? What responsibility, if any, does the United States have to foreign consumers of dangerous U.S. products? Also, cigarettes and other tobacco products are luxury items that arguably should not be atop the trading list of countries whose citizens are undernourished and whose technology is underdeveloped, but the world of trade does not always place the highest value on products that are "good" for people. It is unrealistic to believe that in the near future trade in tobacco products will be curtailed significantly because of the long-term effects of smoking. Even so, the concerns raised here are worthy of consideration and reflection in the course of the material that follows.

[26] Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222 § 2, 84 Stat. 89 (codified at 15 U.S.C. § 1335 (1988)).

[27] 15 U.S.C. §§ 1331-1333 (1988). Warnings to consumers are required on each package of cigarettes and on advertisements of cigarettes. The warnings must be conspicuous and are meant to be very clear indicators of the risks accompanying smoking. For example, one of the following four warnings is required by § 1333 for cigarette packages: "Surgeon General's Warning: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy; Quitting Smoking Now Greatly Reduces Serious Risk to Your Health; Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight; Cigarette Smoke Contains Carbon Monoxide." *Id.* § 1333.

[28] 15 U.S.C. § 1341(a) (1988).

[29] S. RIDLEY, THE STATE OF THE STATES 25-26 (1988). The eight states that, as of 1987, have not enacted laws prohibiting smoking in public places are: Alabama, Illinois, Louisiana, Missouri, North Carolina, Tennessee, Virginia, and Wyoming.

[30] 53 Fed. Reg. 12,358 (1988).

public places.[31] These efforts have generally been unsuccessful,[32] but they do reflect strong antismoking sentiment.

The United States is still unsurpassed as a market for tobacco products. However, the mood towards cigarettes and smoking has grown very negative. Both nonsmokers and the federal and state governments have been active in making sure that smokers know the risks involved and in seeking to establish a "zero tolerance" for smoking. This hostile attitude, accompanied by increasingly restrictive legislation, makes foreign markets ever more attractive.

Not all legislation directed at the tobacco industry is hostile, however. In fact, Congress has recognized that the United States benefits from the net trade surplus associated with tobacco exports[33] and has made the export of tobacco products easier by exempting tobacco exports from the strict warnings and labelling requirements on domestic cigarettes.[34] We see, then, that even though state and federal legislation work to some extent to restrain domestic tobacco consumption, exports of tobacco are encouraged by Congress. For Congress the dangers of smoking must be peculiarly U.S. phenomena.

C. Potential Tort Liability

The last important domestic signal of hostility towards the tobacco industry is a recent landmark case in which Antonio Cippolone, widower of a long-time smoker, was awarded $400,000 in damages against Liggett Group, Inc., a manufacturer of cigarettes.[35] Mr. Cippolone brought an action against Liggett, Phillip Morris, Inc., and Lorillard, Inc., seeking damages personally and on behalf of his wife's estate. Mrs. Cippolone had smoked Liggett's cigarettes for over forty years and died of lung cancer in 1983. The jury awarded $400,000 to Mr. Cippolone on the basis of violation of an express warranty associated with Liggett's cigarette advertisements.

---

[31] *See, e.g.*, Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716, 721 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979) (no fundamental right to have air free of cigarette smoke); Federal Employees for Non-Smokers Rights v. United States, 446 F. Supp. 181 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 310 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 926 (1979) (restriction of smoking in Federal buildings to designated areas is invalid); GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979) (nonsmokers not entitled on Constitutional grounds to injunction requiring county to ban smoking in county buildings).

[32] *Contra* Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

[33] Tobacco exports aided the U.S. balance of payments by $2.18 billion in 1987. TOBACCO PROFILE, *supra* note 1, at 3.

[34] *See* 15 U.S.C. § 1340 (1988). Exempting tobacco exports from the labelling requirement is generally beneficial to the industry, but it also calls to mind the objections mentioned *supra* note 25, regarding the promotion of tobacco exports to foreign countries that may not be completely aware of the health risks of smoking.

[35] Cippolone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988).

Cippolone is significant because it is the first successful case of its kind against the tobacco industry.[36]

In the immediate aftermath of *Cippolone*, many people were convinced that this stunning breakthrough would result in a deluge of new cases against the tobacco industry.[37] Realizing that the tobacco industry was no longer judgment-proof[38] and that cases could now be won against the industry, a wave of optimism swept over the plaintiff's bar.[39] Several reports indicated that tobacco was destined to go the way of the Dalkon Shield and asbestos.[40] Others predicted that *Cippolone* opened the door for punitive damages.[41] The general feeling was that, even if *Cippolone* was not the last word, the system for mass torts would eventually catch up with the tobacco companies.[42]

Regardless of whether the actual number of lawsuits commenced against the tobacco industry increases over the long run, the fact remains that, in *Cippolone*, a cigarette manufacturer was held liable where no liability had been found before. The litigation resulting from *Cippolone* may best be described as "not a disabling onslaught, but a nagging fact of business life."[43] Even so, the potential of liability is another reason for the shift of attention towards foreign markets.

III. Section 301 of the Trade Act of 1974 as a Remedy to Trade Barriers

The benefits of international trade are maximized when trade is free and open. In the years following World War II, U.S. industries were the primary beneficiaries of world trade and enjoyed a position atop the world's financial pyramid.[44] Over the years, though, the U.S. position waned as developing countries asserted themselves. As a result, the United States became more concerned with what was

---

[36] Between the time of printing and publishing this Comment, *Cippolone* was overruled by the Third Circuit. Cippolone v. Liggett Group, Inc., No. 88-5784 (3d Cir. Jan. 5, 1990) (WESTLAW, Federal library, 3d Cir. file). The Third Circuit found error in the jury's consideration of Mrs. Cippolone's post-1965 conduct as it related to comparative fault; such conduct is related only to damages apportionment. The court also reopened Mr. Cippolone's failure to warn and express warranty claims.

One result of the court's ruling is that the tobacco industry has wiped its record clean of tort liability. Another result, though, is that Mr. Cippolone now has available a wider range of claims against Liggett, Phillip Morris, and Lorillard, Inc.

[37] *See, e.g.*, 121 N.J.L.J. 1309, 1309 (1988); 122 N.J.L.J. 745, 745 (1988).

[38] Used in the nontraditional sense of the term, meaning "invulnerable" to suit.

[39] *See, e.g.*, Moss, *The (Smoking) Chain is Broken: First Judgment Against Tobacco Firms to Signal More Suits*, 74 A.B.A. J., Aug. 1, 1988, at 28.

[40] *See, e.g., id.* at 28, 29; 121 N.J.L.J. 1309, 1328 (1988).

[41] 121 N.J.L.J. 1309, 1309 (1988).

[42] Gerber, *Cippolone Signals the End of Era*, 121 N.J.L.J. 1309, 1333 (1988).

[43] Chicago Daily L. Bull., Sept. 12, 1988, at 14, col. 2.

[44] *See* Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. U.L. REV. 492 (1987).

becoming a one-way flow of trade. Over the last decade U.S. exporters have found it increasingly difficult to penetrate foreign markets, yet at the same time U.S. markets have been inundated with foreign products. The natural result has been a severe decline in the U.S. balance of trade. The United States perceived the erection of foreign trade barriers such as import quotas, tariffs and local content requirements to be a primary reason for the one-way flow of trade and reacted with legislation intended to help open foreign markets. Section 301 of the 1974 Trade Act was one important product of this legislative reaction.[45]

The following sections of this Comment contain a brief introduction to section 301,[46] a review of the history and purpose of section 301,[47] and a look at the substantive and procedural requirements involved in a section 301 petition/investigation.[48] Then there will be a description of cases in which the tobacco industry has used section 301 to obtain greater market access,[49] and a critical analysis of section 301 as a trade remedy.[50]

A. Overview of Section 301

Section 301 contains broad authority conferred by Congress, pursuant to Article II of the Constitution,[51] to the USTR. It permits the USTR to take retaliatory action against foreign nations in order to enforce the rights of the United States under trade agreements,[52] or in response to "act[s], polic[ies], or practice[s]" that "unjustifiably, unreasonably, or discriminatorily burden or restrict United States commerce."[53] An investigation by the USTR under section 301 may be mandatory[54] or discretionary[55] and may be initiated either by petition of an "interested person"[56] or by the USTR.[57] The USTR may respond by withdrawing trade agreement concessions, imposing duties or other import restrictions, or negotiating

---

45 Trade Act of 1988, *supra* note 4, § 301.

46 *See infra* notes 51-58 and accompanying text.

47 *See infra* notes 59-65 and accompanying text.

48 *See infra* notes 66-89 and accompanying text.

49 *See infra* notes 90-120 and accompanying text.

50 *See infra* notes 121-35 and accompanying text.

51 "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . ." U.S. CONST. art. I, § 8, cl. 3.

52 Trade Act of 1988, *supra* note 4, § 301(a)(1)(A). The USTR normally interprets "trade agreement" to mean either the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 27 U.N.T.S. 19, or an agreement under § 3(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a) (1982). *See* Bello & Holmer, *U.S. Trade Law and Policy Series No. 10: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211, 212 n.3 (1987).

53 Trade Act of 1988, *supra* note 4, § 301(a)-(b).

54 *Id.* § 301(a).

55 *Id.* § 301(b).

56 *Id.* § 302(a)(1).

57 *Id.* § 302(b)(1)(A).

agreements with the foreign country to remove the offending barriers.[58] Thus, section 301 is potentially a powerful tool available to benefit tobacco exporters, albeit indirectly, through both the threat and imposition of retaliatory measures against a foreign country that has unfairly closed its markets to U.S. tobacco exports.

B. History of Section 301

Executive power to respond to unfair foreign trade practices can be traced back to 1794 when Congress granted President Washington the power to restrict imports and exports from foreign nations when he felt they had discriminated against U.S. commerce.[59] Grants of similar retaliatory power have since been reaffirmed repeatedly.[60] The predecessor of section 301 was section 252(c) of the Trade Expansion Act of 1962, which allowed Presidential action in response to improper foreign import restrictions.[61]

There are two primary reasons for the existence and scope of this statute permitting unilateral response to international unfair trade practices. First, existing international fora for dispute resolution are not satisfactory. For example, it is argued that the executive branch must be able to act outside the General Agreement on Tariffs and Trade (GATT) because much of GATT is either inappropriate now or regularly breached.[62] Second, there are relatively few measures by which exporters can avail themselves of markets that are closed due to the policies of a foreign government. In addition, executive action beyond countervailing duties and antidumping laws is needed to deal with subsidized foreign exports when those goods are reducing U.S. exports to third-country markets.[63] In order to meet these needs and to boost U.S. exports, section 301 was created to "provide the President with 'negotiating leverage' to 'insure fair and equitable conditions for United States commerce' and 'to eliminate [trade] barriers . . . and . . . distortion on a reciprocal basis.' "[64]

Thus, the history and purpose of section 301 indicate that Congress intended to give power to the President to defend U.S. opportunites for international trade. The manner in which the President wields this power generates much critical attention and a pressing

---

[58] *Id.* § 301(c)(1)(A)-(C).

[59] Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL'Y INT'L BUS. 569, 573 n.18 (1982).

[60] *Id.*; *see also* Field v. Clark, 143 U.S. 649 (1892); Godbaw, *Reciprocity and its Implications for U.S. Trade Policy*, 14 LAW & POL'Y INT'L BUS. 691, 702-09 (1982).

[61] Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872, 879-80, *repealed by* Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43.

[62] S. REP. No. 1298, 93d Cong., 2d Sess. 166, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7304 [hereinafter S. REP. No. 1298].

[63] H.R. REP. No. 571, 93d Cong., 1st Sess. 66, 67 (1973).

[64] Note, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1127 (1987) (quoting S. REP. No. 1298, *supra* note 62, at 7302).

demand for results. Section 301 was amended in both 1984 and 1988,[65] in order to fine tune the statute for more reliable and significant results.

C. *Substantive Elements of Section 301*

1. *When May Action Be Taken?*

One of the most significant changes made to section 301 by the 1988 amendments deals with when the USTR may or must take action. Prior to 1988, action under section 301 was *entirely discretionary* regardless of the nature of the allegations or the origin of the petition. Now, however, action is *mandatory* on two occasions: (1) When the USTR finds a denial of U.S. rights under a trade agreement,[66] or (2) When the USTR finds that "an act, policy, or practice of a foreign country—(i) violates, or . . . denies benefits to the United States under any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce."[67] "Unjustifiable" acts are those that violate the international legal rights of the United States, including denial of most-favored-nation (MFN) treatment.[68] There are, however, exceptions to mandatory action under section 301. For example, if the United States receives an unfavorable ruling under GATT regarding the denial of trade agreement benefits, the USTR may refuse to exercise that option. In addition, if the USTR finds that the foreign country is making progress in granting to the United States its trade agreement rights, retaliation under section 301 may be postponed or rejected. Other exceptions to mandatory retaliation include: (1) where the foreign country has agreed either to eliminate the "act, policy, or practice" or has agreed with the USTR how best to remove the burden on commerce; (2) where it is impossible for the foreign country to comply specifically with the trade agreement but it has agreed to provide other compensatory trade benefits; or (3) where action under section 301 would involve detriment to the United States substantially-disproportionate to its benefits, or when such action would cause serious harm to national security.[69]

After the 1988 amendments, as before, the USTR may still take *discretionary* action if he determines that "an act, policy, or practice of a foreign country is *unreasonable* or *discriminatory* and burdens or restricts U.S. commerce" and such action is appropriate.[70] "Unrea-

---

65 Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304(a)-(c), (f), 98 Stat. 3002-05 (codified at 19 U.S.C. §§ 2411-16 (Supp. IV 1986)); Trade Act of 1988, *supra* note 4, § 301.

66 Trade Act of 1988, *supra* note 4, § 301(a)(1)(A).

67 *Id.* § 301(a)(1)(B).

68 *Id.* § 301(d)(4).

69 *Id.* § 301(a)(2).

70 *Id.* § 301(b) (emphasis added).

sonable acts" do not necessarily violate international legal rights of the United States, but must be "unfair and inequitable."[71] Such acts include denial of fair opportunity for establishment of an enterprise, denial of protection for intellectual property rights, toleration by foreign goverments of systematic anticompetitive activities, and export targeting.[72] In judging unreasonableness, the USTR considers the economic development of the country, the "overall advancement" by the foreign country of workers rights, and whether reciprocal opportunities are available for foreigners within the United States.[73] "Discriminatory" acts include those which deny MFN treatment.[74] Regardless of whether the action is mandatory or discretionary, the President may still advise the USTR regarding action taken to eliminate the offending act.[75]

The USTR is authorized under section 301 to retaliate by suspending or withdrawing trade agreement benefits or by imposing duties on goods or restrictions on services of the foreign country.[76] In taking these actions, the USTR must give preference where feasible to the imposition of duties[77] and must limit the action to penalize goods of the foreign country in an amount equal to the burden on U.S. commerce.[78] Also, the action, though it must be nondiscriminatory on the part of the United States,[79] may affect goods or services of the foreign country whether or not such goods or services were involved in the act or policy by the foreign government.[80]

2. *Who May Initiate an Investigation?*

An investigation may be initiated either upon a petition by an "interested person"[81] or, regardless of the filing of a petition, by the USTR.[82] A valid petition under section 301 must show the interest being affected; the U.S. right (if under section 301(a)) being denied under a trade agreement; the laws and regulations which are the subject of the petition; the foreign country with whom the United States

---

71 *Id.* § 301(d)(3)(A).

72 *Id.* § 301(d)(3)(B).

73 *Id.* § 301(d)(3)(C)-(D).

74 *Id.* § 301(d)(5).

75 *Id.* § 301(a)(1)(B)(ii), (b)(2). Prior to 1988, all action was within the discretion of the President. The 1988 amendments transferred the authority from the President to the USTR and made some action mandatory. *See supra* notes 66-74 and accompanying text.

76 Trade Act of 1988, *supra* note 4, § 301(c)(1)(A)-(B).

77 *Id.* § 301(c)(5)(A).

78 *Id.* § 301(a)(3).

79 *Id.* § 301(c)(3)(A).

80 *Id.* § 301(c)(3)(B).

81 *Id.* § 302(a). "Interested person" is defined as including "domestic firms and workers, representatives of consumer interests, United States product exporters . . . ." *Id.* § 301(d)(9). Also, interested parties must have a "significant" interest. 15 C.F.R. § 2006.0(b)(1988).

82 Trade Act of 1988, *supra* note 4, § 302(b).

has an agreement; the product or service subject to the foreign act; and that the foreign acts are unjustifiable, unreasonable, or discriminatory, and that they burden or restrict U.S. commerce.[83] Within forty-five days of receipt of the petition the USTR must decide whether to initiate an investigation and he must notify the petitioner and publish the determination, with the reasons therefor, in the Federal Register.[84] If an investigation is initiated, the USTR must notify the foreign country and request consultation of the policies at issue.[85] If the results of the investigation are affirmative (*i.e.*, that retaliation is warranted), the USTR must declare within a specified time the action to be taken.[86] The statute also contains various provisions regarding consultation with U.S. agencies and industries,[87] public hearings,[88] and modification and termination of the retaliatory action.[89]

D. Section 301 in Practice

Initially, section 301 petitions for governmental retaliation were uncommon. In recent years, however, the use of section 301 as a tool for opening markets has increased dramatically. For example, before September 1985, only forty-eight investigations were started under section 301.[90] Private parties initiated each of these.[91] In contrast, from September 1985 to April 1986 the President or the USTR initiated ten investigations[92] and private parties petitioned for retaliation in six other cases.[93] This indicates both an increased awareness by the Reagan Administration of the potential effectiveness of section 301 and a willingness to use section 301 vigorously to open new markets.

The tobacco industry has been involved with section 301 on five

---

[83] 15 C.F.R. § 2006.1 (1988).

[84] Trade Act of 1988, *supra* note 4, § 302(a)(2)-(4).

[85] *Id.* § 303(a)(1).

[86] *Id.* § 304(a)(2). If the case involves a trade agreement, the action will be declared the earlier of 30 days after the conclusion of the dispute settlement procedure, or 18 months after the investigation was initiated. If the case was initiated by the USTR, then the action shall be declared within six months after the investigation was initiated. For all other cases the action shall be declared within 12 months of the initiation of the investigation.

[87] *Id.* § 304(b).

[88] *Id.*

[89] *Id.* § 307. This section was added by the 1988 amendments and it is relevant if the § 301(a)(2) exemptions apply, if the action is no longer appropriate, or if the effect on U.S. commerce has changed. It should be noted that good faith petitions for investigation under § 301 will rarely be denied (only one denial prior to 1987, see Roses, Inc., 50 Fed. Reg. 40,250 (1985)), but often the reasons for a § 301 investigation will disappear as a result of negotiations and § 307 modifications or termination will be appropriate.

[90] Int'l Trade Rep. Reference File (BNA), Section on Presidential Retaliation, Reference Table 1, 49:0801 (Jan. 1988) (Section 301 Table of Cases).

[91] *Id.*

[92] *Id.*

[93] *Id.*

occasions.[94] The USTR has initiated investigations for the industry twice[95] and the tobacco industry initiated three additional cases.[96]

The first use of section 301 on behalf of the tobacco industry occurred on March 14, 1979, when the Special Representative for Trade Negotiations[97] received from the Cigar Association of America, Inc. (CAA), a petition alleging unfair trade practices by Japan.[98] The petition alleged unreasonable import restrictions burdening U.S. commerce in cigars.[99] The unreasonable restrictions included the following: (1) A minimum testing period of from one to two years; (2) a ban on private press releases about the product; (3) advertising only to inform of price changes; and (4) a ban on information about the product except in the Japanese tobacco monopoly's catalog for imported brands.[100] The CAA alleged that if the United States could achieve a fifty-five percent reduction in the artificially elevated retail price of cigars in Japan and could eliminate the import restrictions noted above, then U.S. cigar exports could grow by more than five million dollars within just a few years.[101]

In October 1979 the Associated Tobacco Manufacturers (ATM) also submitted a section 301 petition alleging unreasonable trade practices by Japan.[102] The alleged unreasonable actions set forth in the ATM petition were substantially similar to the allegations in the CAA petition, but also included the allegation that their imported pipe tobacco was authorized to be sold in fewer than 3,800 of the 250,000 retail markets in Japan and that minimum delivery requirements imposed on the outlets further restricted sales of imported tobacco.[103] The ATM petition also indicated that the current (1979) market share of pipe tobacco, estimated at $240,000, could be expanded to $12,000,000 if reasonable pricing schemes were adopted and if the marketing restrictions were eliminated.[104]

Because of their substantial similarity, the USTR consolidated the CAA and ATM petitions[105] and began negotiations with Japan. These negotiations produced an agreement between the United States and Japan before U.S. retaliation occurred and even before a special GATT panel determined whether or not the Japanese prac-

---

94 *See infra* notes 98-120 and accompanying text.

95 *See infra* notes 108-114 and accompanying text.

96 *See infra* notes 98-107, 115-120 and accompanying text.

97 The Special Representative for Trade Negotiations is now referred to as the United States Trade Representative.

98 44 Fed. Reg. 19,083 (1979).

99 *Id.*

100 *Id.* at 19,084.

101 *Id.*

102 *Id.* at 64,938.

103 *Id.*

104 *Id.* at 64,939.

105 46 Fed. Reg. 1,388-89 (1979).

tices violated GATT.[106] The agreement reduced tariffs on imported pipe tobacco and cigars and liberalized other restrictions including those on advertising and distribution.[107]

The USTR initiated a second investigation of the Japanese market on behalf of the tobacco industry on September 16, 1985.[108] The focus of the investigation was, again, on the high tariffs, discriminatory rules on marketing and distribution (including a prohibition on foreign manufacture of cigarettes in Japan), and the maintenance of a government monopoly on the import and sale of tobacco.[109] After discussing the investigation with the domestic tobacco industry, the USTR consulted with Japan. Without having to impose retaliatory tariffs or quotas, Japan agreed that tariffs on cigarettes would be reduced to zero, that the discriminatory excise tax payments by the monopoly would be eliminated, and that the discriminatory distribution practices would stop.[110]

On October 27, 1986, President Reagan initiated a section 301 investigation on behalf of the tobacco industry when he proclaimed in a memorandum for the USTR that "acts, policies, and practices by . . . Taiwan regarding the distribution and sale of United States . . . tobacco products are unjustifiable, unreasonable or discriminatory and burden or restrict United States commerce."[111] The President noted that Taiwan had failed to abide by an agreement made in 1985 to ". . . allow United States products to be sold in all retail outlets where Taiwanese products were sold, (3) permit the retail prices of imports to be marked up at no greater rate than the prices for domestic products, and (4) allow market forces to determine the importation of these products."[112] The President then directed the USTR to propose "proportional countermeasures" against Taiwan.[113] In this case, as in the preceeding ones, Taiwan agreed to cease the offending unfair trade practices soon after the initiation of a section 301 investigation.[114]

Another recent section 301 petition by the U.S. tobacco industry was filed on January 22, 1988,[115] and the USTR initiated an investigation on February 16, 1988.[116] The U.S. Cigarette Export Association (CEA) alleged that South Korean policies restrict open and

---

106 *Id.*
107 *Id.*
108 50 Fed. Reg. 37,609 (1985).
109 *Id.*
110 51 Fed. Reg. 35,995-96 (1986).
111 *Id.* at 39,639.
112 *Id.*
113 *Id.*
114 *Id.* at 44,958. The Presidential Memorandum also condemned Taiwanese policies regarding beer and wine.
115 5 Int'l Trade Rep. (BNA), No. 4 at 105 (Jan. 27, 1988).
116 5 Int'l Trade Rep. (BNA), No. 7 at 206 (Feb. 17, 1988).

nondiscriminatory access to tobacco markets and cause an estimated loss of over $500 million of potential exports each year.[117] The petition alleged the following unfair trade practices: Retail prices of imported cigarettes fixed at a prohibitive level through tariffs and taxes; a one percent annual quota on imports; the existence of a tobacco manufacturing monopoly; the denial of licenses and investment by foreign firms; a domestic monopoly on the import of cigarettes; the imposition of an unreasonably low retail margin; and a ban on almost all advertising and promotion.[118]

The case against South Korea was settled without retaliation in a manner similar to prior section 301 cases. On May 9, 1988, less than three months after the investigation was initiated, South Korea agreed to reduce the tax on imported cigarettes from 1,000 won to 360 won, to allow U.S. firms to import cigarettes into South Korea and sell them independently of the Korean tobacco monopoly, and to allow all retail outlets carrying Korean brands also to carry U.S. brands.[119] In addition, the USTR announced that foreign firms would now be permitted to advertise and conduct sales promotions.[120]

E. Discussion of Section 301

Compared to other industries, the tobacco industry has made fairly liberal use of section 301 as a negotiating tool to help force open new markets and achieve trade concessions in existing markets. It is curious, though, that more use of section 301 does not occur given the relatively broad and flexible authority that is available.

On behalf of section 301 it should be noted that perhaps no other remedy is so clearly intended to help U.S. exporters.[121] Unlike antidumping and countervailing duty laws, section 301 reserves a great deal of discretion for the USTR in order to maximize the chances for an effective remedy. In addition, whereas other remedies respond to the effects of foreign products within the United States, section 301 looks beyond U.S. borders and seeks to improve our domestic industries by achieving international market access and fair trade.[122] Most important, unlike the antidumping and countervailing duty laws, there is no judicial review of section 301 action and no rigid criteria to meet before an investigation may begin.[123]

---

[117] 5 Int'l Trade Rep. (BNA), No. 4 at 105. CEA said that South Korea unfairly restricted U.S. market share to only 0.06% of the $2.1 billion market in 1986.

[118] *Id.*

[119] 5 Int'l Trade Rep. (BNA), No. 19 at 684 (May 11, 1988).

[120] *Id.*

[121] Bello & Holmer, *Section 301 Recent Developments and Proposed Amendments*, 35 FED. B. NEWS & J. 68 (1988).

[122] *See* Bello & Holmer, *supra* note 6, at 211.

[123] Bello & Holmer, *supra* note 121, at 69.

The wide scope and flexibility of section 301 make it a valuable asset for trade negotiation. Investigations under section 301 may be initiated either by the USTR or by a class of broadly defined "interested persons."[124] In addition, the showing necessary to warrant an investigation under section 301 is easily met.[125] Further, the discretion available to the USTR, though now eliminated in some cases, enables him to evaluate a number of factors before deciding whether and how to retaliate.[126]

Another positive side-effect of section 301 is that even if retaliation does not occur, the federal government becomes more sensitive to the trade barriers faced by domestic exporters. In this respect, section 301 is one way for a private industry to help put trade with a particular area of the world on the government's agenda for future trade policy.

Section 301 is often criticized as being essentially a protectionist device that curtails trade rather than expands it. Because most of the remedies available under section 301 are protectionist, this criticism has merit on its face. A closer look, however, reveals a different story. First, as illustrated by the section 301 cases involving tobacco, most section 301 investigations do not result in *actual* retaliation; therefore, protectionist remedies such as tariffs and quotas are rarely imposed as a direct result of section 301.[127] In fact, it is argued that the *threatened* use of section 301 to block access to U.S. markets is much more effective than *actual* retaliation.[128] Section 301, when threatened by the President or USTR in negotiations with foreign countries, may also allay protectionist sentiment in Congress so that actual retaliation does not occur.[129] From this viewpoint, section 301 can be portrayed as, at least in part, antiprotectionist. Finally,

---

[124] Trade Act of 1988, *supra* note 4, § 302. *See supra* note 81 and accompanying text. The potential for a private party to participate actively in the investigation of international trade practices and to help open new markets for exporting industries is one of the most remarkable aspects of § 301. It is a prime means by which private individuals may help shape the direction and priorities of U.S. trade policy. Whether such participation is an impermissible intrusion on the power of the executive and legislative branches, however, is another consideration that is subject to debate.

[125] For example, a petitioner may merely allege and demonstrate unjustifiable, unreasonable, or discriminatory acts by a foreign government that restrict U.S. commerce. *See* Trade Act of 1988, *supra* note 4, § 301(a)(1)(B)(ii),(2).

[126] The USTR, in his discretion, may consider the progress a foreign government is making towards open trade (or alternatively its intractability), the availability of reciprocal benefits to foreigners in the United States, the political appropriateness of retaliation (both domestically and internationally), the economic consequences to other domestic industries and consumers, and the possibility of risks to national security. He also may consider other factors relevant to the consequences of and need for retaliation. *Id.* § 301(a)(2)

[127] *See* Bronckers, *Private Response to Foreign Unfair Trade Practices—United States and EEC Complaint Procedures*, 6 NW. J. INT'L L. & BUS. 651, 666 (1984).

[128] Bello & Holmer, *supra* note 121, at 70.

[129] Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. U.L. REV. 492, 523 (1987).

whether or not section 301 is a vehicle for protectionism, the fact remains that foreign countries, when faced with investigation and the threat of retaliation under section 301, have generally agreed to reduce tariffs and eliminate or liberalize trade restrictions.

Criticism of section 301, on the other hand, is easily targeted at some of the limitations in the statutory language itself. First, section 301 is a remedy only for unfair trade practices conducted by a foreign government. Thus, private actions by foreigners such as collusion or predatory pricing are not actionable under section 301. This means that U.S. industries being affected by such practices must continue to operate, if at all, at a competitive disadvantage. A second limitation within the statute is the fact that the process of filing a petition, initiating an investigation, consulting with domestic industries and the foreign nation, deciding which action to take, and actually implementing the action, may be too cumbersome and slow to provide timely relief for the restricted industry. A third criticism of section 301 is that the very flexibility that makes it so useful (*e.g.*, the broadness of the "unreasonableness" grounds for investigation) also makes section 301 susceptible to potential abuse by industries, the President, or the USTR.[130] For example, this flexibility may allow the President to assuage protectionist demands by the public or Congress by beginning a section 301 investigation for purely political reasons having nothing to do with the economics of the situation.[131]

Another major source of criticism of section 301 is that it is an under-utilized statute that achieves few results. Section 301 certainly was not used very aggressively prior to 1985.[132] Further, even when section 301 is used, the normal result is merely negotiation with the foreign country ending in an agreement to reduce barriers. These agreements are often ignored by the foreign country, resulting in a new investigation under section 301 and a new agreement.[133] In some cases the threat of section 301 may be useless against a foreign country because of the low amounts of imports by the United States from that country. For example, the potential export market for the U.S. cigarette industry may be large but an offending country with no U.S. market share risks no loss. The retaliatory threat may also be

---

[130] The delegation of power in § 301 may be criticized as too broad. *See generally* Kennedy, *Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion*, 20 CORNELL INT'L L.J. 127 (1987).

[131] *See* Note, *supra* note 64, at 1134.

[132] Int'l Trade Rep. Reference File (BNA), Section on Presidential Retaliation, Reference Table 1, 49:0801. The § 301 Table of Cases reflects the relatively infrequent use of § 301 before September 1985.

[133] For example, recall the cases involving unfair trade practices by Japan discussed *supra* notes 98-110, in which two U.S. tobacco associations petitioned for § 301 action against Japan. An investigation was initiated and an agreement was reached before retaliation occurred. The problem remained, however, as indicated by the fact that the USTR felt compelled to initiate his own investigation under § 301 only five years later. This case resulted in a preretaliation agreement also.

empty if the United States either already has high tariffs or if the United States is perceived as unwilling to back up the threat of retaliation.

The inevitable, and perhaps most important, criticism of any statute like section 301 is that it is protectionist. The negative side of protectionist measures such as tariffs and quotas is that when they are placed on foreign goods or services, the foreign products become more expensive for domestic consumers and trade as a whole is diminished. Thus, when section 301 retaliation occurs, infrequent as it may be, U.S. consumers are forced either to pay more for foreign products or must be satisfied with products of lower quality. To some degree this may benefit a domestic industry that is competing with the imported goods, but in many cases that may not be the same industry that sought the original section 301 relief.[134] The trade minimizing results under section 301 are especially objectionable given the purpose and goals of the statute: "[to enforce] the nation's right to take political action in pursuit of national economic interests that will enforce or expand international trade."[135] In fact, it is ironic that a statute intended to enforce free trade and open markets seeks to achieve that goal by closing or threatening to close its own markets. Indeed, often the U.S. actions being threatened are strikingly similar to the foreign practices complained of and are in violation of GATT.

IV. Conclusion

Even apart from the trading benefits of comparative advantage and an expanded market, there are many reasons why U.S. exporters are anxious to exploit the opportunities of international trade in tobacco. The primary aim here has been to contrast some aspects of the international market (*e.g.*, increasing levels of consumption in markets that include over one-half of the world's population) with the relatively stagnant domestic market characterized by decline in per capita consumption of tobacco, increasing awareness of health risks of tobacco use, greater legislative regulation of the tobacco industry, and newly realized possibilities of tort liability.

The pressures for expanded exports of tobacco are powerful, but so are the barriers to trade. For the exporting tobacco industry section 301 has emerged as a possible remedy to these barriers. It is a bittersweet remedy, however, that is more effective when threatened than when used. It is a remedy that, when used, creates

---

[134] In addition, to the extent foreign goods are produced more efficiently than domestic goods the tariffs or quotas act as indirect subsidies to a relatively inefficient method of production. This may be acceptable in the case of infant industries, but not for longstanding industries whose inefficiency is well established. Also, the tariffs and quotas work to distort the market and minimize the advantages of free trade.

[135] Note, *supra* note 64, at 1127.

the same type of barriers that it was intended to remove. It is a remedy that depends for its effectiveness upon the opponent's own desire for access to U.S. markets. Yet, despite its flaws, section 301 was intended to help private exporters gain better market access and in many cases that result has been accomplished. Negotiations carried out under the threat of section 301 sanctions have been favorable to the United States. The President and the USTR have been willing to use section 301 with increasing frequency and Congress has worked, through recent amendments, to ensure a more aggressive use of section 301. All things considered, section 301 is very likely to play a significant role in future efforts to open foreign markets for U.S. tobacco products as well as virtually all other exports.

In this context, it is appropriate to consider some unanswered questions regarding the results of successful use of section 301 by the tobacco industry. For example, what will be the future of foreign tobacco markets? Will these markets continue to expand despite the growing awareness of health risks or will they grow hostile like some aspects of the U.S. market? Does the United States have a responsiblity to ensure that exports of tobacco products contain warnings about health risks? Will foreign countries create and enforce labelling requirements?[136] Should the United States threaten use of section 301 in order to force those countries to minimize such requirements? Will there be liability for U.S. manufacturers if and when foreign tobacco consumers contract cancer? Are there antitrust implications for action taken by the federal government on behalf of private domestic firms?[137] These questions and more are sure to arise in conjunction with the use of section 301 in pursuit of foreign markets for U.S. tobacco.

FRED H. JONES

136 *See* FINGER, *supra* note 9, at 303 (Appendix 27A: *Major Actions Taken by Countries on Smoking and Health*).

137 *See* Sims & Scott, *Antitrust Consequences to Private Parties of Participation In and Settlement of Selected Trade Actions*, 56 ANTITRUST L.J. 561 (1987).